## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

HANSON AGGREGATES BMC, INC.

and	Cases 04-CA-033330
	04-CA-033508
INTERNATIONAL UNION OF	04-CA-033547
OPERATING ENGINEERS,	04-CA-034290
LOCAL 542, AFL-CIO	04-CA-034362
	04-CA-034363
	04-CA-034378

## ORDER

The Charging Party's Request for Review of the Acting General Counsel's decision sustaining the Regional Director's compliance determination is granted, and the case is remanded to the Regional Director for further appropriate action, as described below.

On September 30, 2008, the Board issued a Decision and Order in this case, finding, among other things, that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by implementing certain changes without bargaining with the International Union of Operating Engineers Local 542 (the Union). As part of the remedy, the Board, in paragraph 2(b) of its Order, directed the Respondent, upon request of the Union, to "rescind the changes to terms and conditions of employment unilaterally implemented on October 24, 2005 and January 1, 2006."<sup>2</sup> The Board did not specifically discuss these changes, but in the underlying Administrative Law Judge Decision, the judge found that the Respondent had implemented one unlawful change on October 24 and seven others on January 1, including implementation of a new

<sup>&</sup>lt;sup>1</sup> 353 NLRB 287.

<sup>&</sup>lt;sup>2</sup> Id. at 290.

compensation system. Under the former compensation system, employees were paid according to their classification and job level, and they could also receive small raises by earning skill points. The new compensation system eliminated skill points and introduced a new system of job classifications that sets a single base wage for each classification with set yearly wage increases.

By letter dated October 8, 2008, the Union, tracking the Board's September 30, 2008 Order, demanded that the Respondent "rescind the changes to terms and conditions of employment unilaterally implemented by the Employer on October 24, 2005 and continuing, as referenced at paragraph 2(b) of the Board's Order." By letter dated November 5, 2008, the Union again demanded that the Respondent "restore conditions to 2005." The Union appears to have made a similar demand during a December 24, 2008 bargaining session.

Despite these seemingly straightforward demands, the Respondent claimed that the Union's requests were not clear and asked the Union to list the specific changes it wanted rescinded. On March 20, 2009, the Union again advised the Respondent that it wanted to return to "conditions as they existed on October 2005" but also provided a non-exclusive list of specific changes it wanted rescinded. One specific request was for restoration of skill points, but the Union did not mention the wage increases associated with the new compensation system.

Following this exchange, the Respondent advised the Region that the Union was seeking only restoration of skill points and not rescission of the new compensation system or the associated wage increases. The Respondent argued that because of the structure of the former compensation system—something not fully explored by the

Board or the administrative law judge—the Union was not entitled to restoration of skill points without asking for rescission of the new compensation system and the associated wage increases. After investigating the matter, the Region agreed with the Respondent.

At that point, the Region asked the Union whether it in fact wanted the wage increases rescinded. According to the Region, the Union wavered from its general position and indicated that it was not asking for rescission of the wage increases but was asking for restoration of skill points. Subsequently, on March 16, 2010, Union organizer Frank Bankard gave the Region an affidavit in which he stated that, although the Union had previously said it was not asking for rescission of the wage increases, "the Union has always been asking to have everything restored to October 2005, including wages," and that this included rescission of the wage increases "if that's what needs to be done in order to restore skill points." Even so, based on the Union's perceived shift in position on the wage increases, the Region directed the Union to expressly request rescission of the wage increases from the Respondent in writing. The Union's communications with the Respondent after the Region's directive do not clearly include such a request, although a letter dated November 15, 2011 asks the Respondent why wage rates have not been returned to 2005 levels.

On December 20, 2011, the Regional Director for Region 4 issued a compliance determination letter, finding that the Respondent had fully complied with the Board's Order and closing the cases. In that letter, the Regional Director found, among other things, that the Union had not made a clear request for rescission of the wage increases. In so finding, the Regional Director found that (1) the Union had not specifically requested rescission of the wage increases in the March 20, 2009 letter; (2)

the Union had told the Region it was not seeking rescission of the wage increases; (3) the Union subsequently failed to request rescission of the wage increases in writing; and (4) the Union did not clarify its position on the wage increases when prompted to do so by the Respondent in August 2011.

On January 26, 2012, the Union filed with the Acting General Counsel an appeal of the Regional Director's determination. By letter dated June 26, 2012, the Acting General Counsel denied the Union's appeal. In denying the appeal, the Acting General Counsel essentially adopted the reasoning set forth in the Regional Director's compliance determination letter.

Thereafter, on July 7, 2012, the Union filed the instant request for review of the Acting General Counsel's decision pursuant to Section 102.53 of the Board's Rules and Regulations. See also *Ace Beverage Co.*, 250 NLRB 646 (1980). In requesting review of the Acting General Counsel's decision, the Union contends, among other things, that the Regional Director should not have closed the case on compliance because the Union had requested rescission of the wage increases, both in its repeated requests for rescission of all unilateral changes and in its November 5, 2011 letter. The Region filed a response to the Union's request for review, the Union filed a reply, the Region filed two further responses, and the Union filed four further replies.<sup>3</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.<sup>4</sup> Having duly considered the matter, we grant the Union's request for review.

<sup>3</sup> The Respondent has not filed a response to the Union's request for review.

<sup>&</sup>lt;sup>4</sup> Member Griffin, who is a member of the present panel, has recused himself and took no part in the consideration of this case.

The Union's initial request expressly demanded that the Respondent rescind the changes "as referenced at paragraph 2(b)" of the Board's Order, which itself refers to the changes (eight in total) that the judge, adopted by the Board, found unlawful. Since that initial request, the Union has consistently demanded rescission of all unlawful changes. The Union's demands have not always been phrased identically or with lawyerly precision, but those demands all indicate that the Union desired rescission of all eight unlawful changes.

The Region, however, imposed a further requirement that the Union expressly request rescission of the wage increases in writing. Both the Regional Director's compliance determination and the Region's briefs opposing the Union's request for review acknowledge the Union's broad requests for restoration of the status quo to October 2005, but both reject these requests as insufficient without further explanation. It is true that the Board requires an affirmative request for rescission of potentially beneficial unilateral changes, but the Board has never indicated that such an affirmative request must contain the degree of specificity the Region demanded here. Nor does anything in the Board's Order indicate that the Union was obligated to set forth, by name, each of the specific changes it wanted rescinded.

We acknowledge that some confusion was introduced when the Region asked the Union if it wanted the wage increases rescinded. The Region did so, however, after nearly a year during which the Union had clearly and repeatedly requested rescission of all changes. Moreover, the origin of the confusion appears to have been the Respondent's request for a list of the specific changes that the Union wanted rescinded,

<sup>&</sup>lt;sup>5</sup> See, e.g., *McClatchy Newspapers, Inc.*, 339 NLRB 1214, 1216 fn. 6 (2003).

combined with the Respondent's interpretation of the Union's March 2009 (nonexclusive) list as demanding restoration of skill points without rescission of the wage increases. Accordingly, based on the information before us, the confusion that led to the Region's directive for a specific written request resulted from the Respondent's claim that the Union's original, general requests were not adequately clear. Once again, the Board's Order does not require the Union to provide a list of the specific changes it wants rescinded, nor are we aware of any precedent stating that an affirmative, general request for the rescission of multiple unlawful changes is not adequate. Under these circumstances, we think that the Union's general requests make its intent clear enough: it wanted all unilateral changes, including the new compensation system, rescinded. Any subsequent confusion over the particulars of the new compensation system, occasioned by the Respondent's request for clarification of the Union's already-clear demand, does not, in our view, detract from the Union's general demands, which encompass rescission of that system. Moreover, the Board's usual policy is to resolve any ambiguities or uncertainties that occur during compliance against the wrongdoer, not the wronged party. See Ferguson Electric Co., 330 NLRB 514, 515-516 (2000), enfd. 242 F.3d 426 (2d Cir. 2001), overruled on other grounds, Oil Capitol Sheet Metal, Inc., 349 NLRB 1349, 1353 (2007). Thus, without further explanation of why the Union's general requests—particularly its direct request that the Respondent rescind all changes referenced in paragraph 2(b) of the Board's Order were not sufficiently clear, we cannot determine whether the Regional Director appropriately closed compliance proceedings.

Accordingly, we remand this case to the Regional Director for Region 4 for further action consistent with this Order. If, after reviewing this matter in light of the above considerations, the Regional Director again determines that the Respondent has fully complied with the Board's Order, the Regional Director shall issue an amended compliance determination containing a more detailed explanation of the evidence and precedent he relies on to determine that the Union's general requests for rescission of all changes were not sufficient to invoke the remedial duties set forth in paragraph 2(b) of the Board's Order. The Union will be entitled to appeal such determination to the Acting General Counsel pursuant to Section 102.53(a) of the Board's Rules and Regulations, and subsequently to file with the Board a request for review of the Acting General Counsel's decision on appeal, pursuant to Section 102.53(c) of the Board's Rules and Regulations.

Dated, Washington, D.C., March 19, 2013.

MARK GASTON PEARCE, CHAIRMAN
SHARON BLOCK, MEMBER

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<sup>&</sup>lt;sup>6</sup> We note that the Region appears to assume that restoration of the former compensation system (with attendant skill points) would require wage reductions for those employees who receive more pay under the new compensation system than they would under the restored former compensation system. The Regional Director's determination shall include an explanation of why this is so, assuming that there are in fact employees who are better off under the new compensation system than they would be under the restored former compensation system.